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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS MALDONADO,

Defendant and Appellant.

B201890

(Los Angeles County
Super. Ct. No. SA060855)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Robert P. O'Neill, Judge. Affirmed.

Jeanine G. Strong, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Appellant Luis Maldonado was convicted of second degree robbery (count 1) and possession of a firearm by a felon (count 2), with enhancements for personal use of a firearm and one prior prison term. He was sentenced to a total of 16 years in state prison. His sentence includes the upper term of five years on count 1 and a two-year concurrent sentence on count 2. He contends: (1) The trial court erred when it refused to give a unanimity instruction on count 2. (2) Imposition of the upper term on count 1 violated his Sixth Amendment right of the United States Constitution to trial by jury.

We find no prejudicial error and affirm.

FACTS

1. Prosecution Testimony

It was stipulated, for the purpose of count 2, that appellant had previously been convicted of a felony.

On the afternoon of July 8, 2006, Jonathan Martinez was working alone as cashier of a “mini-mart.” A man came in and asked Martinez to exchange coins for paper money. Martinez refused. The man walked toward the door, waited there briefly, returned to Martinez, and repeated his request. This time, Martinez opened the register and gave the man a \$10 bill in exchange for two rolls of dimes. The man walked toward the door. He then ran back to Martinez, pulled out a gun, and jumped over the counter to Martinez’s side. Waving the gun at Martinez, he demanded all the money in the register. Frightened, Martinez opened the register. He moved away from the register when the man kicked him. The man removed approximately \$500 from the register. The money included many \$1 and \$5 bills. The man left the store and rode off on a bicycle.

Martinez contacted the police and provided a description of the crime and the robber. The crime was recorded on the mini-mart’s surveillance video. A police officer saw the video that same day and recognized appellant, who lived at his mother’s house in that area.

That evening, police officers conducted surveillance outside of appellant's mother's house. They watched from a distance as appellant walked out of the house, looked around from side to side, and retrieved an object from some bushes. He got into the passenger's side of a parked car, which started to drive away. The officers stopped it and searched it. Its driver was appellant's girlfriend, Angelica Ruelas. A cocked, loaded handgun was found under the seat where appellant had been sitting. Ms. Ruelas said she had never seen the gun before. Appellant initially gave a false name to the officers. He had approximately \$328 in currency in his pockets, including "four 10 dollar bills, 37 five dollar bills, and 103 one dollar bills."

Martinez picked out appellant's photo from a photographic lineup and identified him at the trial.

2. Defense Testimony

Dr. Mitchell Eisen, an expert on eyewitness identification, described factors that might lead to memory errors and misidentification.

DISCUSSION

1. Refusal to Give a Unanimity Instruction

The evidence showed possession of a gun at two different points in time, as appellant used a gun during the robbery in the afternoon and possessed a gun that evening when he was arrested in the car.

On count 2, appellant was charged with and convicted of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)). He maintains that the trial court should have given a unanimity instruction on count 2, to ensure a unanimous verdict on the unlawful act that he committed. He relies on this principle: "When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act." (*People v. Melhado* (1998))

60 Cal.App.4th 1529, 1534; see also Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

Respondent counters that the instruction was not necessary because the prosecutor made an election of the specific act during argument.

The record shows that, during a break in the testimony, the prosecutor asked for specific wording on the verdict form that would ensure a unanimous verdict on count 2 based on the evidence that appellant possessed a gun at two different points in time. The court refused.

During a break in final argument, the prosecutor returned to the issue, this time requesting both a unanimity instruction and a special finding. The court again rejected the request.

The prosecutor explicitly told the jury during final argument that count 2 was based on appellant's possession of the gun in the car and not possession of the gun during the robbery.¹ That argument constituted an unequivocal election of the act that formed the basis of count 2.

Appellant maintains that the prosecutor failed to make an election. He relies on statements by the prosecutor, later in the argument, indicating that although the guns appellant possessed in the afternoon and evening appeared to be the same gun, there might have been two different guns, but that was a question the jury did not need to decide. We find nothing in that concept to negate the clear election that the prosecutor had already made.

¹ The prosecutor's specifically stated, during the argument about count 2: "[W]hat we're referring to here is when he is caught with [the gun] at the car, okay? Obviously, he has one at the robbery as well, but that's -- you already have the use of that allegation that you are making that determination on with the firearm. [¶] But at the time that he's caught in the car, is what we are focusing on here" The prosecutor's discussion of that count included appellant's grabbing of the object at the bushes and his constructive possession of the gun when it was under the car seat.

The prosecutor's election during argument would end the issue, but for a problem that arose during jury deliberations, as the jurors asked a question that showed they did not understand the prosecutor's election. The question was, "If we find the defendant guilty of committing the robbery with a firearm, can we use this as a basis for finding him guilty of count 2?" The court responded: "You are to evaluate, as I instructed you, each count separately in this case, and *you are to evaluate each count based on all the evidence that was presented*, is the best and only way I can answer that question. You must base your decision on the evidence -- all the evidence that was presented." (Italics added.)

The court's response to the jury was erroneous, as it should have reminded the jury that count 2 was based on the evidence of appellant's possession of the gun in the car, and not on his committing the robbery with a firearm. The error was harmless beyond a reasonable doubt, however, under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24, as there was overwhelming evidence that appellant possessed a gun, both when he robbed the mini-mart in the afternoon and when he was arrested in the car in the evening.

We reach that conclusion because appellant's commission of the armed robbery was caught on videotape, and he had part of the loot in his pocket when he was arrested in the car. Shortly before his arrest, the officers saw him remove, from the bushes near his residence, an object that must have been the hidden gun. He brought the gun with him into the car, and it was under his seat when he was arrested shortly later. His girlfriend, the car's driver, denied knowledge of the gun, so he had to be the person who put the gun under the seat. Any error regarding the absence of a unanimity instruction was therefore harmless.

In discussing this issue, appellant also contends that no reasonable jury could have convicted him on count 2 based on the gun found under the car seat, and a conviction on that basis relied on a legally insufficient theory. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1122.) Applying the appropriate standard of review (*People v. Catlin* (2001) 26 Cal.4th 81, 139), we reject those additional contentions, as the

only reasonable inference from the evidence is that appellant retrieved the gun from the bushes just before he entered the car and hid it under the car seat just before his arrest.

2. The Upper Term

The trial court imposed the upper term on count 1, the robbery count, because appellant was a recidivist who was on parole at the time of the offense. To preserve the claim for further review, appellant contends that imposition of the upper term violated his Sixth Amendment right of the United States Constitution to trial by jury under *Cunningham v. California* (2007) 549 U.S. 270, *Blakely v. Washington* (2004) 542 U.S. 296, and *Apprendi v. New Jersey* (2000) 530 U.S. 466.

The factor in aggravation utilized by the trial court is derived from “the fact of a prior conviction” exception to the right to jury trial. As explained in *People v. Black* (2007) 41 Cal.4th 799, 818-820 (*Black II*), that exception originated in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*). Appellant maintains that the *Almendarez-Torres* exception should be limited to the *fact* of a prior conviction.

In *Black II*, *supra*, 41 Cal.4th at pages 819-820, the California Supreme Court determined that the *Almendarez-Torres* exception extends beyond the fact of the prior conviction and includes “other related issues that may be determined by examining the records of the prior convictions.” Consequently, *Black II* permitted imposition of the upper term because the defendant’s criminal record contained prior convictions that were “numerous or of increasing seriousness.”

More recently, in *People v. Towne* (2008) 44 Cal.4th 63, 70, the California Supreme Court held, “[T]he aggravating circumstance that a defendant served a prior prison term or was on probation or parole at the time the crime was committed may be determined by a judge and need not be decided by a jury.” The issue resolved in *Towne* was pending at the time of appellant’s briefing. It has now been resolved. As we must follow the decisions of the California Supreme Court (*Auto Equity Sales*,

Inc. v. Superior Court (1962) 57 Cal.2d 450, 455), we reject appellant's contention regarding the propriety of the upper term on count 1.

DISPOSITION

The judgment is affirmed.

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FLIER, J.

We concur:

COOPER, P. J.

BIGELOW, J.